

## EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Families, Community Services and  
Indigenous Affairs and Minister for Disability Reform

*National Disability Insurance Scheme Act 2013*

*National Disability Insurance Scheme (Facilitating the Preparation of Participants'  
Plans—South Australia) Rules 2013*

Section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) provides that the Minister may, by legislative instrument, prescribe matters required or permitted by this Act to be prescribed or which are necessary or convenient to be prescribed in order to carry out or give effect to this Act.

The *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—South Australia) Rules 2013* (the Phasing Rules—South Australia) are made pursuant to sections 32 and 32A of the Act (but not under subsection 32A(4)).

The Phasing Rules—South Australia are about the order in which the CEO National Disability Scheme Launch Transition Agency (DisabilityCare Australia) will commence the facilitation of the preparation of plans for different classes of participants in South Australia.

The Minister in making the Phasing Rules—South Australia has had regard to financial sustainability of the National Disability Insurance Scheme (the scheme) as required under subsection 209(3).

The Phasing Rules—South Australia are Category B rules for the purposes of the Act. Accordingly the Commonwealth and the host jurisdiction, the Government of South Australia, have agreed to the making of the rules (see section 209 of the Act).

### **Background**

In 2011, the Productivity Commission report, *Disability Care and Support* (Report No. 54), found that 'current disability support arrangements are inequitable, underfunded, fragmented and inefficient, and give people with a disability little choice' (Overview, p. 5), and recommended the establishment of a National Disability Insurance Scheme. People who are participants in the scheme will be assisted to develop a personal, goal-based plan about how they will be provided with general supports and reasonable and necessary supports.

The Act was enacted in March 2013 giving effect to the commitment by the Commonwealth, State and Territory Governments to establish such a scheme, and for its progressive implementation from July 2013. The Act sets out the statutory framework for the scheme, and for DisabilityCare Australia to administer the scheme.

The Act is to be supplemented by National Disability Insurance Scheme rules, which address the more detailed operational aspects of the scheme. The Phasing Rules—South Australia is one of a number of instruments that comprise these rules.

To enable an orderly launch, participants will be phased into the scheme. There are two steps involved in accessing supports under the scheme. The first is to become a participant: the prospective participant makes an access request and the CEO decides that they meet the access criteria. The second is for the participant to have a plan approved by the CEO of DisabilityCare Australia. The Phasing Rules—South Australia relate to the second step, and the order in which the CEO will commence facilitating the preparation of plans for different classes of participants.

In South Australia, the launch of the scheme initially will be restricted to persons in particular age groups: see the *National Disability Insurance Scheme (Becoming a Participant) Rules 2013*. For the first year of the scheme (1 July 2013 to 30 June 2014), only persons under the age of 6 can become participants. In the second year, the scheme will become accessible to persons aged under 14, and from the third year, to persons aged under 15.

The Phasing Rules—South Australia explain how participants in South Australia in the first year will be phased into the scheme. The Phasing Rules—South Australia set out the process for working out when the CEO must commence facilitating the preparation of the plan of a participant in South Australia.

From 1 July 2014, the scheme will become accessible to persons in other age groups in South Australia. For persons in these other age groups, it is intended that future rules will deal with how the facilitation of the preparation of their plans is to commence.

## **Commencement**

The Phasing Rules-South Australia commence on 1 July 2013.

## **Consultation**

The Phasing Rules—South Australia were developed in close consultation with the Government of South Australia.

The Phasing Rules—South Australia is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

## Explanation of provisions

The Phasing Rules—South Australia has three Parts:

- **Part 1** explains what these Rules are about.
- **Part 2** deals with the preparation of plans for residents of South Australia.
- **Part 3** deals with other matters, including interpretation of the Phasing Rules—South Australia.

### Part 1 – What these Rules are about

**Paragraphs 1.1 to 1.6** are explanatory and contextual.

The phasing process is based on an agreement that has been reached between the Government of the Commonwealth and the Government of South Australia (the Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch, Schedule C—Bilateral Agreement for NDIS Launch between the Commonwealth and South Australia), and is intended to give effect to that agreement. These documents are available at [www.coag.gov.au](http://www.coag.gov.au).

### Part 2 – Preparation of plans for residents of South Australia

**Paragraphs 2.1 to 2.3** explain how the CEO is to commence facilitating the preparation of a plan for a participant. The process for commencing the facilitation of the preparation of plans for participants in South Australia is set out in a table in paragraph 2.7 sets out four classes of South Australian participants and sets out the circumstances in which the CEO is to commence the facilitation of the preparation of those participants' plans. The CEO will deal with each class sequentially; facilitation for a class will be commenced once the CEO has decided that DisabilityCare Australia has the capacity to do so, in light of the number of participants in previous classes whose plans have been dealt with, and the number yet to be dealt with.

**Paragraph 2.4** explains the dates used in the Schedule.

**Paragraph 2.5** summarises the effect of subsection 32(3) of the Act.

**Paragraph 2.6** summarises the effect of subsection 32A(3) of the Act.

**Paragraph 2.7** sets out four classes of South Australian participants and sets out the circumstances in which the CEO is to commence facilitating the preparation of those participants' plans.

The classes and circumstances in which the CEO is to commence each class have been defined jointly with the State of South Australia to ensure that there is a smooth and steady transition for participants within these classes from the service or support they previously received to the scheme. This arrangement will provide certainty for:

- individuals about when they will enter the new scheme;
- providers to assist their business planning; and
- governments to ensure that they can plan for the future of affected programs and the expected impact on their budgets.

The CEO has a discretionary power to delay the commencement of several classes according to DisabilityCare Australia's capacity to begin facilitating new plans. This discretion would allow the CEO to respond to unforeseen events in South Australia, or unanticipated levels of demand.

The details within this table are intended to give legal effect to the Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch, Schedule C—Bilateral Agreement for NDIS Launch between the Commonwealth and South Australia).

**Paragraph 2.8** concerns the situation were the CEO to consider that DisabilityCare Australia's facilitation of the preparation of plans for participants in a class described in the table in paragraph 2.7 (a main class) would be best managed by commencing that facilitation sequentially in different areas of South Australia. The CEO may decide that, among the participants of the main class, there is to be one or more classes (subclasses) comprised of participants who reside in particular areas.

**Paragraph 2.9** specifies that for each subclass, the CEO is to commence facilitating the preparation of the plans of participants in the subclass when the CEO decides that it is appropriate to do so. The paragraph imposes conditions on the making of the decision.

**Paragraph 2.10** specifies that despite paragraph 2.7, the CEO may decide that all participants who reside in a particular remote or regional area constitute a class. The paragraph specifies when this decision can be taken and when the plans will then be facilitated.

**Paragraph 2.11** specifies that consultation must occur with the Government of South Australia in relation to decisions made under paragraphs 2.8 to 2.10.

**Paragraph 2.12** requires the CEO when considering making a decision referred to in the third column of the table in paragraph 2.7 after the date mentioned in that column, the CEO must, consult with the Government of South Australia and of the Commonwealth Department that administers the Act and use his or her best endeavours to reach an agreement with those entities about the proposed decision.

### **Part 3 – Other matters**

#### *Citation*

**Paragraph 3.1** specifies the citation for the Phasing Rules—South Australia.

*Interpretation*

**Paragraphs 3.2 to 3.4** give guidance on interpretation and definitions for certain terms used in the Phasing Rules—South Australia.

## Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview

This instrument sets out the circumstances in which the facilitation of the preparation of participants' plans will commence in the State of South Australia. The instrument identifies classes of South Australia participants and sets out the circumstances in, or periods within, which the CEO is to commence the facilitation of the preparation of those participants' plans.

#### *Progressive implementation*

Consistent with the recommendations of the Productivity Commission, the scheme will be implemented progressively. The initial five launch sites are the Hunter region in New South Wales, the Barwon region in Victoria and South Australia and Tasmania for specified age cohorts (to be launched in July 2013), and the Australian Capital Territory (to be launched in July 2014). A sixth launch site is also planned in 2014 for the Barkly region in the Northern Territory. The launch sites and the services to be offered in each have been selected to enable evaluation of operations and subsequent fine tuning, if necessary, to ensure the robustness and integrity of the scheme when it is rolled out nationally.

In each launch site there is a gradual intake of participants to ensure that all participants are well supported as they make the transition to the scheme.

The launch sites, and coverage are:

- South Australia - progressively State-wide launch for a children's cohort model, with 0 - 5 years olds in the first year, 0 - 13 year olds in the second year, and 0 - 14 year olds in the third year (around 5,000 children in total);
- New South Wales - all clients (estimated to be around 10,000) in the Hunter region, covering the local government areas of Newcastle, Maitland and Lake Macquarie;
- Australian Capital Territory - all potential clients (estimated to be more than 5,000) in the jurisdiction;
- Victoria - all potential clients (estimated to be around 5,000) in the Barwon region, covering the local government areas of the City of Greater Geelong, the Colac-Otway Shire, the Borough of Queenscliff and the Surf Coast Shire;
- Tasmania - all eligible 15 - 24 year olds in the jurisdiction (estimated to be around 1,000).

## Human rights implications

The Phasing Rules—South Australia engage the following human rights:

- The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 3 (general principles), 4 (general obligations) and 9 (accessibility) and 19 (living independently and being included in the community);
- Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR); and
- The rights of children in the Convention on the Rights of the Child (CRC), especially Articles 2, 9, 18 and 23.

### *General Principles underpinning the CRPD*

The CRPD recognised the barriers that persons with disabilities may face in realising their rights. While the rights under all human rights treaties apply to everyone, including persons with disabilities, the CRPD applies human rights specifically to the context of persons with disabilities.

The establishment of the scheme promotes the rights of people with disabilities in Australia by providing access to nationally consistent funding and support to help them realise their aspirations, and to participate in the social and economic life of the community.

The preamble of the CRPD, and the General Principles set out in Article 3 reflect the need for the respect for the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), the need for persons with disabilities to be able to participate fully and effectively and be included in society, the need for respect for difference and acceptance of persons with disabilities as part of human diversity and providing persons with disabilities the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

The objectives and general principles of the Act provide that:

- People with disability should be supported to participate in, and contribute to social and economic life to the extent of their ability;
- People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime; and
- People with disability should be supported to receive reasonable and necessary supports, including early intervention supports.

The Phasing Rules—South Australia recognise that contributing to social and economic life to the extent of their ability is integral to participants' sense of belonging and wellbeing in their communities, a right that is promoted in Articles 3 and 19 of the CRPD.

The objects and the guiding principles of the scheme also recognise the rights of persons with disabilities to be provided with reasonable and necessary supports to live independently, engage in the life of the community, and to have certainty that they will receive the lifelong care and support they need. The role of carers, families and other significant persons is also recognised and respected. In this way, the Rules promotes Article 10 of ICESCR, which requires that the widest possible protection and assistance should be accorded to the family, especially while it is responsible for the care and education of dependent children.

#### *Progressive implementation of the scheme and the principle of non-discrimination*

The right to equality and non-discrimination is protected by Article 2 of the ICCPR and Article 2 of the CRC which prohibits denying a person or child rights on certain grounds. This is reinforced in the context of human rights for persons with disabilities by Article 3 (b) of the CRPD which provides that non-discrimination is a general principle in relation to all rights in the CRPD. As noted by the Human Rights Committee in General Comment No. 18 on equivalent rights in the ICCPR, the rights to equality and non-discrimination in the ICCPR sometimes require nation states 'to take affirmative action in order to diminish or eliminate conditions which cause or help perpetuate discrimination'.

Non-discrimination ensures that no one is denied their rights because of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth. In addition to those grounds, discrimination on certain other grounds may also be prohibited. These grounds include age, nationality, marital status, disability, place of residence within a country and sexual orientation.

Accordingly differential treatment will not constitute discrimination if the differences in treatment are aimed at achieving a legitimate purpose and are reasonable and proportionate to this purpose.

#### *Progressive implementation by age*

The Phasing Rules—South Australia impose additional limitation on access to the scheme based on age.

Under the Phasing Rules—South Australia there is progressive implementation of the scheme by age in South Australia. The additional age limitations are a temporary limitation with the express purpose to test the effectiveness of processes and supports for particular sub-groups within the general population of people with disabilities. The scheme operations and outcomes in these this site will be evaluated and if required processes will be refined to ensure optimal effectiveness when the scheme is rolled out nationally.



In South Australia, the focus on children from 0 - 5 years olds in the first year was chosen particularly to assess the effectiveness of early intervention processes. Allied with this was the potential benefits to individual children in terms of reduced lifelong support needs.

The temporary age restrictions in South Australia are considered reasonable and proportionate, because of the overarching aim to ensure the integrity of the scheme when it is nationally extended.

## **Conclusion**

This instrument is compatible with human rights because it advances the protection of the rights of persons with disabilities in Australia, consistent with the CRPD. The Phasing Rules—South Australia create additional opportunities for persons with disabilities to exercise those rights by providing support to enable participation in the social, economic and cultural life of the community. To the extent that the Phasing Rules—South Australia limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the scheme.